

BENGE - Direct

1 subsequent weeks discussing that, did Stacey Smith
2 come back into the scope as a potential intervenor?

3 A No. I asked Donna later on, after the turn
4 of the New Year, I asked her at some point, more than
5 once, if she was seeing Stacey Smith, and she said,
6 "No."

7 In fact, her reaction was kind of peculiar
8 because she said, "Oh, no. I'm not." It led me to
9 believe that the suggestion that she and Stacey Smith
10 would have a relationship was something she found
11 not -- she found repugnant. That he was her friend.
12 He was someone she counted on to help at Oak Grove,
13 but because of the age difference, she could never
14 become interested in him romantically.

15 I asked her about that several times. Each
16 time she denied it in a similar way that led me to
17 believe that I was, again, being paranoid asking the
18 question.

19 Q Christmas Eve Day, 2001, what do you
20 remember regarding any unusual event that day?

21 A Well, I had -- Christmas is Donna's big time
22 of the year. She starts planning for Christmas on
23 December 26th, and she stops after midnight on

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OFFICIAL COURT REPORTER

A49

BENGE - Direct

1 December 24th. It's 365 days of the year for her.
2 She buys Christmas presents all year round, and it's
3 just the time of year that she celebrates the most.
4 Everything revolves around Christmas.

5 And I was hoping that the holiday spirit and
6 the family togetherness that we were going to have,
7 and which we did have, December 25th, 2001, that that
8 would work to bring us together because Christmas had
9 been so happy for us for so many years. That Donna
10 would see that this is what had to be preserved.

11 She said she had to work a half day on
12 Christmas Eve. It was a week day, and then she was
13 going to see her aunt, not really her aunt, but a
14 sort of distant relative who is called aunt for
15 convenience sake. Her name is Evelyn Macoy. She
16 lives in Wilmington not very far at all from where
17 Donna works. Donna said she would be seeing Evelyn
18 after work, and we could expect her home after that.

19 Because it was Christmas Eve, all the kids
20 were home. Laura was home from school, and we were
21 going to begin our holiday together.

22 So I knew that Donna had found a new
23 favorite jewelry store in Rehoboth called Fun to

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A 50

BENGE - Direct

1 Find, and I had been down there weeks before,
2 whenever, I'm not sure, and I had gotten her a pair
3 of earrings, two stars on the end of a little chain,
4 one star on each ear. That, I thought reflected the
5 holiday, and I was going to tell her she was one star
6 and I was the other.

7 I was going to stop in her office and give
8 those to her. Just as sort of an idea of how she was
9 feeling that day and just to have some time between
10 myself and her alone. Her office is on King Street
11 in Wilmington. And I pulled up in the block. Her
12 office is in the 1200 block. I pulled in the 1300
13 block to park, which is one block north.

14 And I parked right behind a truck that
15 seemed familiar to me. I got out to go to her
16 office, and I said, "That's a very familiar looking
17 truck," and I looked at it. And it was a big black
18 Dodge diesel V8 with the extended cab, and instead of
19 truck tires, it just has very small tires, not big
20 truck tires like you would expect at all. Small
21 tires that sometimes people are familiar with trucks
22 even laugh at. And I said, "I know that truck. I've
23 seen it. And that is Stacey Smith's truck."

CHRISTINE L. QUINN
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A51

BENGE - Direct

1 Q Did you charge in to the workplace and catch
2 them?

3 A No. No, I looked at the truck. I looked in
4 the back. I saw there was a couple of little small
5 gift packages, like you get at the store when they
6 don't want to gift wrap, but they give you sort of a
7 holiday bag. I saw those. I looked around.

8 I looked at the license plate number, and I
9 said, "That is Stacey Smith's truck, and he must be
10 there with Donna." So, no, I got in my car, and I
11 drove away.

12 And I thought it must be -- I know Donna is
13 very dependent on Mr. Smith for Oak Grove business.
14 So I thought it was something where he had been in
15 the neighborhood, perhaps, and they got together, or
16 he had stopped by her office, and they were just
17 there for a few minutes. So I didn't want to
18 embarrass anybody. I will go. It's time for me to
19 go. I will go away, and I will see Donna later.

20 Q When did Donna move out of the house, Snuff
21 Mill?

22 A Well, she said here that she moved out in
23 September of 2001, and that's the first I learned

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OFFICIAL COURT REPORTER

A52

BENGE - Direct

1 about that. As far as I know, she didn't move out
2 until March of 2002.

3 Q Wouldn't you have noticed that she was no
4 longer at home?

5 A Well, I think if Donna did not come home,
6 yes, I would notice if that were the case, and the
7 nights that she spent at her brother's house, her
8 brother Doug's house, on West 19th Street in
9 Wilmington I was very concerned. I would call to see
10 if she was there.

11 And one night, in fact, I went to Doug's
12 house, West 19th Street, to make sure that she was
13 there. So, yes, if she had moved out, I certainly
14 believe I would have noticed.

15 Q By March of 2002 when she did move out, what
16 was your impression regarding her being involved,
17 other than Jim Doe, which had ended by that point,
18 with any other male?

19 A None. Because I asked her again had anyone
20 replaced me in her heart, and again, I had asked her
21 if she was involved with Stacey Smith, and she said
22 no. In a way, that was unmistakably clear.

23 Donna had never, never said anything to me,

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OFFICIAL COURT REPORTER

A53

BENGE - Direct

1 which I later learned was untrue. She had never lied
2 to me. I thought her incapable of telling an untruth
3 because even when we were eating dinner and we would
4 get telephone solicitation calls and Donna would be
5 very annoyed, but she would not hang up. I would
6 tell her to tell whoever it was that she already had
7 that particular product. I have already got one of
8 those so I'm going to hang up, but she wouldn't say
9 that.

10 She would not tell an untruth, and I thought
11 that I could fully trust her and believe her if she
12 told me she was not involved with anyone else, and,
13 specifically, when I asked if it was Stacey Smith and
14 she said no, that there was no question, and she was
15 not involved with him because she would not lie to
16 me.

17 Q You heard Stacey Smith talk about a
18 telephone conversation that was initiated by you, you
19 with him, and you heard him testify to that on
20 Thursday?

21 A A telephone conversation where I called him
22 at his home, yes, sir.

23 Q Do you know the date of that?

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A 54

BENGE - Direct

1 Q Okay, you told us part of the why. I guess
2 I will finish up on the why. When you gave her
3 whatever it is that you are going to give to her, did
4 you expect to be on planet earth much longer?

5 A Mr. Hurley, after the things that had
6 happened, I began to think that there was no place
7 for me and that everybody would be better off if I
8 was not around. So, yes, I thought I would have no
9 need for it.

10 Q Now you had been through a family suicide
11 situation four or five years earlier, and so I guess
12 it was devastating?

13 A November of 1997, yes, we had been through
14 that as a family, yes.

15 Q So even you have firsthand knowledge of what
16 that does to the survivors?

17 A Very close. My sister Peggy was younger
18 than me. My birthday is October 22nd. Her's was
19 October 23rd, and so the family always said that she
20 was my birthday present that year. So we were very,
21 very close, and I blame myself forever because
22 shortly before her death, there were signs that I
23 should have seen, and I should have done something.

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A55

BENGE - Direct

1 you. Would you recite your recollection of the
2 conversation when the three of you were in the same
3 room at the same time?

4 A Yes. I came in, and Mr. Smith was there,
5 and before I said anything, Donna came into the room.
6 And I had brought coffee for Donna. So it was kind
7 of a flat situation.

8 I said, "Do the kids know about this?" And
9 by that, I think everybody present knew that I was
10 referring to the fact that Mr. Smith was there in the
11 mornings. And Donna said to me, "Yes, they know."
12 And then she said, "I think you better leave." And I
13 put the coffee down on the table, and I left. The
14 doughnuts also, but I left, yes.

15 Q Did you raise your voice, get angry, yell,
16 scream?

17 A No. There was nothing to raise my voice
18 about. Donna told me that the kids were aware of
19 what was going on. I was not aware that the children
20 knew, and that's all there was to discuss.

21 Q After you left there that day in July, did
22 you return to those premises without her permission
23 in order to place a tape recording device?

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A56

BENGE - Direct

1 A Unfortunately, yes, Mr. Hurley, I did that.

2 MR. HURLEY: May we have an instruction,

3 Your Honor?

4 THE COURT: All right.

5 Ladies and gentlemen of the jury, I think I
6 told you last week from time to time evidence would
7 come in, and it would be of a nature that it would
8 only come in for a certain purpose. I think we are
9 going to hear a repeat of evidence that the
10 prosecution earlier, or previously offered, and when
11 it came in at that time, I read to you an
12 instruction, which explains to you how you are
13 supposed to consider that evidence. And I'm going to
14 read to you that instruction again.

15 Ladies and gentlemen, you are about to hear
16 evidence which you might regard as evidence of other
17 bad acts. This evidence was offered in the past by
18 the prosecution in the context of demonstrating the
19 mental state or motive that the State alleged the
20 defendant had. It cannot be used for any other
21 purpose. The weight that you give this evidence, if
22 any, as it pertains to the defendant's mental state
23 or motive, is entirely for you to decide in your

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OFFICIAL COURT REPORTER

A57

BENGE - Direct

1 discretion as you see fit.

2 While I am allowing the introduction of this
3 evidence, as a matter of law, you are not, in any
4 way, to interpret that decision as any reflection of
5 the Court's view of the evidence or the weight, if
6 any, to which it is entitled.

7 I want you to understand that you must not
8 use this evidence to infer that the defendant is a
9 person of bad character who, because of bad
10 character, is more likely to be guilty of any one of
11 the offenses that he is charged with.

12 You are required to consider all of the
13 evidence that is introduced before you in order to
14 determine whether the State has met its burden
15 proving guilt beyond a reasonable doubt.

16 Go ahead, Mr. Hurley.

17 MR. HURLEY: Thank you, Your Honor.

18 BY MR. HURLEY:

19 Q Why did you make your way into 203 Florence
20 Avenue and leave a tape recorder in the residence?

21 A I had to know the truth. I had to know what
22 Donna -- I had to know if she had betrayed me. I had
23 to know if I was being told the truth. I had to know

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A58

BENGE - Direct

1 that. I wanted to be right, Mr. Hurley. I wanted to
2 be right.

3 I wanted to prove to myself that Donna had
4 told me the truth when she said that I want a divorce
5 because I want it to be just me and the kids for a
6 while. There is no one else. I just want it to be
7 me and the kids. I had to know if that was true.

8 And I thought that if I could prove to
9 myself that Donna and Mr. Smith were not sleeping in
10 the same bed, that they were just friends, that it
11 was just an extension of the Oak Grove people, of the
12 Oak Grove crew, and I thought it would be that.

13 I knew deep down inside that I had to be
14 wrong in my thought that they had a relationship that
15 was intimate, and I knew I could prove to myself that
16 it wasn't that. That they weren't intimate. That I
17 was misreading the situation entirely. That Donna
18 was being truthful to me.

19 And I thought that this was a way that I
20 could find out, and I was foolish, foolish, but I had
21 to prove -- I had to have proof one way or another.
22 I had to know.

23 Q As a result of placing a tape recorder in

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A59

BENGE - Direct

1 her home, her temporary home I guess you could say,
2 were you able to gather together tapes and listen to
3 the contents?

4 A Yes.

5 Q And would you characterize for the jury's
6 benefit the significance of things that came from
7 those tapes that you were able to hear?

8 A Well, they were horrible in quality, just
9 miserable. I couldn't -- for a long time, I couldn't
10 decipher anything, and that gave me comfort. That
11 there was nothing on there.

12 But then, I picked up a couple of areas that
13 were suspicious, and my son had a lot of sound
14 equipment. He's got computers and video games and
15 electronics and whatever. And I was able to use one
16 piece of equipment to adjust the speed and the tone
17 of the tape, and in two separate areas, I picked up
18 sounds of sexual activity.

19 Q Meaning?

20 A Specifically?

21 Q Specifically.

22 A There was a sound of a bed, or mattress, and
23 then what appeared, or what sounded like, a male

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A 60

BENGE - Direct

1 groaning, and then Donna saying, "Are you okay,"
2 which I knew when she says that -- I know when she
3 says that.

4 Q You heard that before?

5 A Yes, I heard it many, many, many times.

6 Q What else was on the tape that you could
7 decipher?

8 A Then the tape of the next day, the tape of
9 the next night, there was Donna and Mr. Smith
10 laughing and laughing, and Mr. Smith said, as he was
11 laughing, "I haven't -- I hadn't thought of that,"
12 and Donna said, "I like -- I like to explore." And I
13 knew what that was.

14 Q Was there anything else?

15 A Donna also said what she liked to do. That
16 was on the tape as well.

17 Q Did that involve a reference to oral sex?

18 A Yes.

19 Q How many hours did you spend listening to
20 those excerpts?

21 A Not hours, Mr. Hurley.

22 Q Minutes?

23 A Days.

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A 61

BENGE - Direct

1 Q Over and over and over?

2 A Yes.

3 Q What month of what year was it that you were
4 doing this?

5 A July, the last part of July of 2002.

6 Q Why were you doing that to yourself?

7 A Because I couldn't believe it. And I
8 thought I was wrong. If I listened to the tapes
9 enough, the material would not be there.

10 Q That's illogical?

11 A That's why I listened to the tapes to make
12 it go away.

13 Q Did it go away?

14 A No.

15 Q Were you taking any medication at that
16 point?

17 A I don't take medication.

18 Q From that point on, tell the jury, if you
19 will, the journey that led you to arm yourself and go
20 that Sunday morning to Oak Grove?

21 A Well, I kept -- I resolved that's what I had
22 to do. I had to remove -- I had to remove the
23 cancer. And the cancer was me. I had to destroy

CHRISTINE L. QUINN
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A 62

BENGE - Direct

1 myself. So I set about determining how I would do
2 it. And I came up with a plan. But I couldn't do it
3 immediately.

4 I found several reasons why not, and then on
5 August the first, I fell off my broken ladder, and I
6 broke my heel, and I was incapacitated for two
7 months. So now I'm tortured by what my life has
8 become, and I can't walk around. So now I did sit at
9 home, and for two months the thought was with me,
10 night and day, as I sat in my chair with my leg up,
11 unable to do anything, and having to live with what
12 had happened to my life.

13 Q A couple years before that, you were
14 surrounded by three children and a wife who was
15 surrounding you in August of 2002?

16 A My son was there only half the time, and I
17 was alone. No one.

18 Q In your thinking, looking back on yourself
19 then, why were you the cancer? Why wasn't Stacey
20 Smith or Donna the cancer?

21 A Donna was the children's mother. She was
22 too important to them, particularly my son. I could
23 never harm her. Never. I could never harm her.

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A63

BENGE - Direct

1 Mr. Smith was just -- was just there. There
2 was nothing special about him. He was just there.
3 Just the same way that Mr. Doe was there. He really
4 meant nothing in the situation. So I had no reason
5 to want to harm him. If I had harmed him, I would be
6 doing nothing to accomplish an end to the situation.

7 If I was gone, Donna had a chance at
8 happiness, and I thought that the kids would recover
9 in due course.

10 Q You mentioned a plan. What was the plan
11 that you formulated as you're sitting there for a
12 couple months disabled, partially disabled?

13 A Well, I was going to shoot myself.

14 Q Where, and under what circumstances?

15 A I was going to shoot myself in the office of
16 the Oak Grove Motel with Donna and Stacey Smith
17 present.

18 Q Would you help the jury understand, who
19 never thought of anything like that, why you chose
20 Oak Grove, and why you chose to have witnesses?

21 A I wanted Donna -- I wanted Donna and
22 Mr. Smith to understand the depth of the hurt, the
23 depth of the consequences of their lies and

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A64

BENGE - Direct

1 deception.

2 If I wasn't going to be around, they were
3 going to know why, and they were going to have to
4 live with the fact that Oak Grove, which is where
5 they met, where they carried on their deceitful,
6 secret relationship, that Oak Grove was where I --
7 where I died.

8 Q And had you thought exactly how you were
9 going to exterminate yourself?

10 A I was going to shoot myself, yes.

11 Q How? Where?

12 A I was going to place my uncle's gun in my
13 mouth and pull the trigger.

14 Q Blow the top of your head off in front of
15 them?

16 A If that's what happens, yes.

17 MS. WITHERS: May we approach, Your Honor?

18 THE COURT: All right.

19 (Whereupon, counsel approached the bench and
20 the following proceedings were had:)

21 MS. WITHERS: Well, on the one hand, I'm
22 very desirous of getting this trial finished.

23 I'm uncomfortable beginning what is going to

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A 65

F-73

J. BENGE - CROSS

1 Q. But it was Stacey Smith whose shadow would
2 never darken the doorway of the Snuff Mill residence,
3 you named him specifically?

4 A. That's who I was talking about at the time,
5 yes.

6 Q. On October 20th when you left Wilmington to
7 go to Rehoboth, you were dressed in dark blue pants,
8 dark blue tee shirt, dark blue sweatshirt with a
9 hoody, and a dark blue baseball cap. Is that your
10 favorite color or were you trying to wear some sort of
11 cat burglar-type attire?

12 A. Blue, Ms. Withers, is my favorite color. I
13 went to Brandywine High School. Their colors are blue
14 and white. They have been mine since that time. When
15 I played football, I was proud to wear those colors.
16 Those are, in fact, my favorite colors.

17 Q. You brought wire cutters with you?

18 A. Yes.

19 Q. Where did you get the wire cutters from?

20 A. I had an extensive tool collection at home.
21 The wire cutters were part of it.

22 Q. Where were they in your outfit that night,
23 where were you carrying them?

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A 666

J. BENGE - CROSS

1 MR. HURLEY: I think this was morning, Your
2 Honor, not at night.

3 THE COURT: What I think she is referring to,
4 he would have left his residence in Wilmington
5 "sometime during the night?"

6 MR. HURLEY: Thank you.

7 THE WITNESS: Well, what you are referring to
8 is wrong. I did not leave my residence sometime in
9 the middle of the night, but the answer to your
10 question: The wire cutters would have been in one of
11 the pockets of the pants.

12 BY MS. WITHERS:

13 Q. Where did you get the keys to the motel
14 office door?

15 A. From Donna's car.

16 Q. The same time when you went into her car to
17 get the Florence Avenue keys or a different occasion?

18 A. Probably on a different occasion.

19 Q. So there was more than one occasion you have
20 gone into her car to take things out and made copies
21 of them and replaced the originals?

22 A. Yes.

23 Q. So those keys were not given to you by

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A-67

J. BENGE - CROSS

1 anyone?

2 A. Not the keys to the office, no.

3 Q. The pants that you were wearing actually had
4 a canvas belt on them, but the holsters were on a
5 leather belt around the waist, would you agree that's
6 accurate?

7 A. Yes.

8 Q. That's because you wanted to make sure the
9 guns were secured around your waist?

10 A. No. The canvas belt was part of the pants.
11 That was built into the pants. They were there to
12 hold up my trousers. The leather belt was there for
13 the holsters, yes.

14 Q. Where did you get the holsters from?

15 A. My uncle's.

16 Q. They came with the two guns?

17 A. Yes.

18 Q. Did you load the guns at home in Wilmington?

19 A. I did not load the guns. The guns were
20 loaded when I got them from my uncle's and I did not
21 unload them.

22 Q. Did you check them before you left?

23 A. I don't know that I did.

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A68

J. BENGE - CROSS

1 Q. Well, you said your plan was to commit
2 suicide. Didn't you want to make sure the guns had at
3 least one bullet in them?

4 A. I could see there were rounds, bullets in the
5 cylinders. The guns were in the holsters. The
6 holsters were on the belt. I did not wear them as I
7 drove. I got down to the motel and I put the belt
8 with the holster on at that time. I don't know that I
9 ever opened up the guns to check them.

10 Q. Gee, you had been working on this plan for a
11 number of months and you don't bother to open up the
12 guns to check to see if there were an adequate number
13 of bullets?

14 A. This was not a situation, Ms. Withers, where
15 I had a checklist. I was very upset. I was
16 distraught. I was debating with myself whether or not
17 this was a thing I should do. And a point of fact, I
18 decided that ultimately I was not going to do it and I
19 did not. As I recall, I can't tell -- I can't sit
20 here and say I methodically opened up the handguns to
21 look to see if there was a round in the chambers. I
22 don't remember that being a part of the process.

23 Q. You know from your training in the Army that

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A 69

J. BENGE - CROSS

1 ammunition can sometimes get stale?

2 A. No, Ms. Withers, they didn't teach us that.

3 Q. You weren't aware of that?

4 A. No.

5 Q. When you got the guns from your uncle's
6 estate, it was a number of years before October 20th
7 of 2002, right?

8 A. Two years.

9 Q. And yet you didn't think: Gee, maybe I ought
10 to put fresh bullets in to make sure nothing went
11 wrong?

12 A. I am sure that's why I carried loose rounds.
13 Your question: Did I check. I can't tell you that I
14 did that. I may have. I can't say yes.

15 Q. Which pocket did you put the speed loaders
16 in?

17 A. One of the pants pocket. It may have been in
18 the same pocket with the wire cutters.

19 Q. Where did you get the spray, pepper spray
20 from?

21 A. I got that from the hardware store. I
22 originally purchased it for my daughter, Sarah. She
23 was going to go to college in Brooklyn and I thought

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A 70

J. BENGE - CROSS

1 she ought to have that, but then I found out she
2 couldn't. It was a small hardware store in the
3 Naaman's Road area. It is the True Value or
4 Silverside Hardware or Claymont Hardware, either of
5 those three places.

6 Q. When did you buy it?

7 A. That would have been in the spring of 2002.

8 Q. What attracted you to that particular brand
9 of pepper spray?

10 A. Nothing that I recall. It was displayed near
11 the counter of the store and I simply picked it up,
12 thinking it might be of some use to Sarah when she
13 went to school in Brooklyn.

14 Q. So you deny you were aware that it was a
15 particularly strong form of disabling spray?

16 A. I have no idea about relative strengths. I
17 don't know that much about pepper spray, if anything
18 at all.

19 Q. You indicated that you broke your heel early
20 in August and, therefore, the plan had to be put off
21 for a while?

22 A. I shattered my heel falling from 18 feet off
23 a ladder on August the 1st, yes.

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A71

J. BENGE - CROSS

1 Q. So the plan had already been somewhat
2 formulated before that accident?

3 A. When you say "the plan", the thinking that I
4 had that I should take my life was going through my
5 head constantly, along with lots and lots of reasoning
6 why I should not do that. There was thinking about
7 it: Yes, no, yes, no all the time. It dominated my
8 thinking. And there was not a set plan, as your
9 question implies. But, yes, when I could not walk,
10 when I was on crutches, there wasn't much opportunity
11 to carry anything out. I can't say that I'm sorry
12 that I broke my heel because it did prevent anything
13 from happening for two months.

14 Q. When you went into the Florence Avenue
15 residence that morning and confronted Donna and
16 Stacey, how did you get in?

17 A. You are talking about in July?

18 Q. Yes, July of 2002, that would be correct.

19 A. Yeah. I think I just walked in the door. It
20 was open.

21 Q. Standing open?

22 A. No, closed.

23 Q. Locked or unlocked?

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A72

F-79

J. BENGE - CROSS

1 questions asked is a deliberate -- it's a violation of
2 what you said.

3 THE COURT: I mean, why wouldn't the answer
4 be: They wouldn't talk to me because of the
5 protection from abuse?

6 MR. HURLEY: It isn't the same. It's not the
7 same if there was a PFA.

8 THE COURT: No. Well, I mean, as I
9 understand it, they had talked before and there were
10 no harsh words said, no threats, none of those things,
11 why is it different now, why would they not come out
12 and talk to him?

13 MR. HURLEY: I, fortunately, have never had a
14 protection from abuse, but I expect if I did whatever,
15 I violated my ex-wife, the ex-wife would pick up the
16 phone and call in. It violates the protection from
17 abuse.

18 THE COURT: I understand that part of it.

19 MR. HURLEY: "Why would you expect it would
20 be different"? The difference is there is a
21 protection from abuse now. They would call and get me
22 the hell out of there.

23 THE COURT: Well, how much further are you

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A73

F-80

J. BENGE - CROSS

1 going with this question? They wouldn't come talk to
2 me.

3 MS. WITHERS: I don't recall how many more
4 questions I have directed to this. I think I'm
5 basically through with them, that point, but maybe I
6 can make the point by simply asking it.

7 MR. HURLEY: I think you have -- the reason
8 for being here, I am afraid the next question: Well,
9 why would it be different.

10 THE COURT: I think you made your point. It
11 is up there for comparison and argument.

12 MS. WITHERS: Okay.

13 THE COURT: And I am afraid if you go too
14 far, we will get something we do not want to hear.

15 MS. WITHERS: Okay.

16 THE COURT: All right. Let's move on.

17 (Whereupon, counsel returned to the trial
18 table and the following proceedings were had:)

19 BY MS. WITHERS:

20 Q. When you walked in you found Donna alone in
21 her bedroom; is that correct?

22 A. Yes. Donna was alone in the bedroom, yes.

23 Q. Did you ask her where Stacey was?

DAVID WASHINGTON
Official Court Reporter

A74

F-81

J. BENGE - CROSS

1 A. I said: Where is Stacey.

2 Q. Did she answer you?

3 A. No.

4 Q. Is that when you sprayed her in the face with
5 the pepper spray?

6 A. I did not spray her in the face with the
7 pepper spray, so the answer to your question is: No.

8 Q. Is that when you sprayed the pepper spray in
9 her general direction?

10 A. I did not spray pepper spray in her general
11 direction, so the answer is: No.

12 Q. How did she wind up with all the pepper spray
13 on her face and her hair?

14 A. Ms. Withers, when I walked in the bedroom, I
15 asked Donna once where Stacey was. She said: What
16 are you doing here. And at that point, my only
17 thought was to make her leave the room, get away from
18 me so that nothing bad would happen. I was hoping she
19 would lock herself in the bathroom. I took out the
20 can and sprayed the can towards the single bed in that
21 room. She said: What is that, and she jumped up off
22 the bed and ran out of the bedroom. If you are asking
23 how she wound up with pepper spray, I can only think

DAVID WASHINGTON
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A75

F-82

J. BENGE - CROSS

1 that she was seated in the living room behind
2 Mr. Smith when I sprayed him in his face to keep him
3 away from me. She was directly in the line of fire of
4 that spray.

5 Q. I thought the purpose of the suicide mission
6 was so she would watch you die, how would she do that
7 if she locked herself somewhere else?

8 A. I wasn't going to, at that point, hurt
9 anyone, not Donna, not Mr. Smith, not myself. I had
10 lost my -- I had lost my thought of doing that. I was
11 too weak. I was too weak a person to carry that out.
12 I did not have the strength. I didn't have that
13 strength.

14 Q. Why didn't you just leave then?

15 A. At what point?

16 Q. Before Stacey -- well, before you chased her
17 into the living room and grabbing her about her neck
18 and before Stacey Smith hears the screams and he has
19 to come running to her aid and Stacey Smith gets shot
20 in the chest? You had a lot of time to walk out of
21 that motel.

22 A. No, Ms. Withers. All of this happened within
23 a matter of a minute or two.

DAVID WASHINGTON
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A76

F-83

J. BENGE - CROSS

1 Q. Why don't you tell us your version of what
2 happened, Mr. Benge?

3 A. I was hoping you would ask for that, so I
4 will do so. I was in House 5. I sat down on the bed.
5 I was watching the oval area. Nothing was happening
6 that Sunday morning.

7 Q. You were watching what area?

8 A. There is the grass oval that separates the
9 office house, the motel and the building where the
10 office and the apartment are.

11 Q. It's a courtyard?

12 A. Well, yes and no. There is another area in
13 which some people may call the courtyard. There is an
14 area that is framed by the stone drive that opens up
15 on Canal Street.

16 Q. I'm sorry, I interrupted you. You were
17 sitting in House No. 5 watching the oval area.

18 A. Nothing was happening. I was debating what I
19 was going to do. Again, I went through the same
20 thoughts for the -- I don't know how many times I had
21 them in the past: Should I do this, should I not do
22 this. And not having resolved it, I went out and I
23 walked around the building that has the office and the

DAVID WASHINGTON
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A77

J. BENGE - CROSS

1 that respect it is also similar?

2 A. I did not know Mr. Smith was there. Yes,
3 Mr. Smith and Donna were there and in that respect it
4 is similar, yes.

5 Q. You had keys that you had stolen to both of
6 the residences and to the motel and in that respect
7 the incidents are similar?

8 A. Yes.

9 Q. The only thing missing were the guns, right?

10 A. And, Ms. Withers, more important, my state of
11 mind.

12 Q. On October 20, 2002, you left your home in
13 Wilmington and you drove to the Oak Grove Motor Court,
14 did you not?

15 A. Yes.

16 Q. You went into the motel and it was early in
17 the morning?

18 A. Yes.

19 Q. It was a Sunday morning?

20 A. That's correct.

21 Q. It was late in October?

22 A. October 20th.

23 Q. The office was still closed when you went in?

DAVID WASHINGTON
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A78

J. BENGE - CROSS

1 A. The office was -- the office door was locked.
2 The office was, at that time of year, open for
3 business. In that sense --

4 Q. It had not yet opened for business that
5 morning?

6 A. That's correct.

7 Q. Donna and Stacey were in the motel room or in
8 the office or in his apartments alone, you knew that?

9 A. I did not know who was there, no. I did not
10 know where anyone was.

11 Q. You didn't watch for a period of time from
12 Room No. 5 as you sat drinking your beer?

13 A. I watched from House 5, not Motel 5. And I
14 did not drink beer and I didn't see anything. No, I
15 didn't see anyone or anything.

16 Q. You weren't drinking?

17 A. I had some type of whiskey with me at that
18 point.

19 Q. Were you drinking it that morning?

20 A. Yes, I did.

21 Q. Did you need some liquid courage?

22 A. No, Ms. Withers. I had that there -- I had
23 that with me in the hope that it might dull the pain.

DAVID WASHINGTON
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A79

J. BENGE - CROSS

1 Q. How long did you sit watching the office
2 before you broke in?

3 A. I didn't break in the office. But to answer
4 your question: I was there for what seemed to be a
5 "lifetime, but was probably 15 minutes, 15 to 20
6 minutes.

7 Q. Then you cut the phone lines?

8 A. Yes.

9 Q. All nine of them?

10 A. I cut however many were there, yes.

11 Q. Did that take some time? Those wires are
12 fairly thick.

13 A. As I recall, Ms. Withers, I wasn't thinking
14 about it. But if I'm not wrong, no, it took no time
15 whatsoever. The wire cutters cut the wires like a hot
16 knife through butter, if I recall. I wasn't thinking
17 about it mechanically at that point. I just did it.
18 But it was very, very simple it seemed.

19 Q. You used the keys you had stolen to unlock
20 the office door and you went into the office?

21 A. Yes.

22 Q. You went in uninvited?

23 A. Correct.

DAVID WASHINGTON
Official Court Reporter

A 80

J. BENGE - CROSS

1 Q. At that point you could have simply walked up
2 to them, addressed them calmly, said whatever you
3 needed to say to them, and then shot yourself in the
4 head; isn't that right?

5 A. Well, that's correct, except as it turned
6 out, Mr. Smith was in a different apartment. And what
7 you suggest just wasn't possible.

8 Q. That was a surprise, wasn't it? You weren't
9 expecting them to be in different bedrooms that early
10 in the morning?

11 A. I didn't know what to expect, Ms. Withers. I
12 didn't know what to expect.

13 Q. When you walked in you could have gone in and
14 Donna was awake, you could have gone into her bedroom
15 and say: Donna, I would like to talk to you and
16 Stacey? Given your past history with the two people,
17 isn't it likely they would have sat with you at the
18 kitchen table and talked to you there in the office?

19 A. No, Ms. Withers, that is not likely to have
20 been the case.

21 Q. Was Stacey Smith going to tackle you?

22 A. I don't know, but I would not have expected
23 that they would have calmly invited me to sit down at

DAVID WASHINGTON
Official Court Reporter

A 81

J. BENGE - CROSS

1 the kitchen table and talk, no.

2 Q. There wasn't a whole lot of difference from
3 what happened at the Florence Avenue residence, was
4 there?

5 MR. HURLEY: Your Honor, may counsel and I
6 approach?

7 THE COURT: Come on up.

8 (Whereupon, counsel approached the bench and
9 the following proceedings were had:)

10 MR. HURLEY: You have made a pretrial ruling
11 that the admission of the PFA would not be appropriate
12 for the jury. The prosecutor is deliberately
13 eliciting questions, what is the difference. The
14 difference would be back in July there wasn't a
15 protection from abuse. These questions are calling
16 for information that contravenes your prior ruling. I
17 ask that we not ask these questions.

18 MS. WITHERS: We determined that he is not
19 having any respect for their privacy or he isn't
20 showing any respect for the divorce decree. I am not
21 trying to elicit a response regarding the protection
22 from abuse. My point, this situation is equally the
23 same as the Florence Avenue residence, except he came

DAVID WASHINGTON
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: A 82

J. BENGE - CROSS

1 A. Ms. Withers, when I walked in the bedroom, I
2 asked Donna once where Stacey was. She said: What
3 are you doing here. And at that point, my only
4 thought was to make her leave the room, get away from
5 me so that nothing bad would happen. I was hoping she
6 would lock herself in the bathroom. I took out the
7 can and sprayed the can towards the single bed in that
8 room. She said: What is that, and she jumped up off
9 the bed and ran out of the bedroom. If you are asking
10 how she wound up with pepper spray, I can only think
11 that she was seated in the living room behind
12 Mr. Smith when I sprayed him in his face to keep him
13 away from me. She was directly in the line of fire of
14 that spray.

15 Q. I thought the purpose of the suicide mission
16 was so she would watch you die, how would she do that
17 if she locked herself somewhere else?

18 A. I wasn't going to, at that point, hurt
19 anyone, not Donna, not Mr. Smith, not myself. I had
20 lost my -- I had lost my thought of doing that. I was
21 too weak. I was too weak a person to carry that out.
22 I did not have the strength. I didn't have that
23 strength.

DAVID WASHINGTON
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A83

J. BENGE - CROSS

1 Q. Why didn't you just leave then?

2 A. At what point?

3 Q. Before Stacey -- well, before you chased her
4 into the living room and grabbing her about her neck
5 and before Stacey Smith hears the screams and he has
6 to come running to her aid and Stacey Smith gets shot
7 in the chest? You had a lot of time to walk out of
8 that motel.

9 A. No, Ms. Withers. All of this happened within
10 a matter of a minute or two.

11 Q. Why don't you tell us your version of what
12 happened, Mr. Benge?

13 A. I was hoping you would ask for that, so I
14 will do so. I was in House 5. I sat down on the bed.
15 I was watching the oval area. Nothing was happening
16 that Sunday morning.

17 Q. You were watching what area?

18 A. There is the grass oval that separates the
19 office house, the motel and the building where the
20 office and the apartment are.

21 Q. It's a courtyard?

22 A. Well, yes and no. There is another area in
23 which some people may call the courtyard. There is an

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A84

J. BENGE - CROSS

1 area that is framed by the stone drive that opens up
2 on Canal Street.

3 Q. I'm sorry, I interrupted you. You were
4 sitting in House No. 5 watching the oval area.

5 A. Nothing was happening. I was debating what I
6 was going to do. Again, I went through the same
7 thoughts for the -- I don't know how many times I had
8 them in the past: Should I do this, should I not do
9 this. And not having resolved it, I went out and I
10 walked around the building that has the office and the
11 apartment in it, cut the phone lines, came up to the
12 front door of the office, put the keys in, walked in,
13 and I was thinking: This is so wrong, I can't do
14 this. I walked over to the little counter with the
15 Formica top that's in the office proper. I can
16 remember resting my head on that, thinking that I
17 couldn't go through with this, there is too many
18 reasons why I could not take my own life. I thought
19 of my children, my family. I thought of what it was
20 going to do to Donna. And then I heard what had
21 sounded like someone walking into the kitchen and I
22 thought: Here I am now where I shouldn't be and I
23 have got no explanation for being here. I can't just

DAVID WASHINGTON
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A 85

J. BENGE - CROSS

1 Q. What do you mean you were afraid to leave it
2 at the house?

3 A. My son was there.

4 Q. You were afraid you might spray him by
5 "accident?"

6 A. I didn't want it in the house with my son
7 present and me not being there. I wanted it out.

8 Q. Had you ever left him alone there at the
9 house with the guns in the garage?

10 A. Yes.

11 Q. So you walked in with the mace, you cut the
12 phone wires -- all nine of them -- You unlocked the
13 office door with the keys that you had stolen out of
14 Donna's car, you then locked the door behind you,
15 right?

16 A. Yes.

17 Q. You then went in search of Donna and Stacey?

18 A. No, I didn't. As I said, I entered into the
19 office area and I knew that I could not do this. I
20 couldn't end my life. I just didn't have the strength
21 to do it.

22 Q. Do what?

23 A. As a final matter, when I was standing in the

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A86

J. BENGE - CROSS

1 office and I was looking at the surroundings that were
2 so familiar to me, I said: I can't do it, I can't
3 kill myself.

4 Q. You were in the office?

5 A. Correct.

6 Q. The door to your escape was right next to
7 you?

8 A. The door to my escape was behind me, yes.

9 Q. In the same room with you?

10 A. Yes.

11 Q. No one had seen you yet?

12 A. At that point, that's what I believed, yes.

13 Q. No one would have seen your van because you
14 had it hidden behind the Oak Grove Motel?

15 A. Yes, parked on 6th Street.

16 Q. All you had to do was undo the two locks and
17 let yourself out quietly and thus end the plan, right?

18 A. That is correct.

19 Q. That isn't what you did, is it?

20 A. No, that's not what I did.

21 Q. You went in and confronted your wife --
22 ex-wife, excuse me?

23 A. Yes.

DAVID WASHINGTON
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A87

J. BENGE - CROSS

1 didn't take advantage of any of them.

2 THE COURT: Are you withdrawing the question?

3 MS. WITHERS: I will withdraw the question.

4 THE COURT: You are right, that made the

5 point.

6 I understand where you are coming from,

7 Mr. Hurley.

8 So just go up and withdraw it and we will

9 move on.

10 (Whereupon, counsel returned to the trial

11 table and the following proceedings were had:)

12 MS. WITHERS: I'll withdraw the question,

13 Your Honor.

14 BY MS. WITHERS:

15 Q. So you go into Donna's bedroom to make sure
16 she hasn't seen you and isn't calling the police. You
17 said when you walked in she was reading, correct?

18 A. Yes.

19 Q. So it was pretty obvious she wasn't on the
20 phone dialing 911 at that point, right?

21 A. Yes.

22 Q. So at that point you feel you need to get her
23 away from you and you hoped to chase her into a locked

DAVID WASHINGTON
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A 88

J. BENGE - CROSS

1 the door, and I was hoping she would lock herself in
2 the bathroom. You said I wanted to chase her into a
3 locked room. No, I wanted to chase her in the
4 bathroom where she could lock herself in and I could
5 get away and run just as far as I could just as fast
6 as I could, which wasn't very far because my ankle was
7 still hurting me.

8 Q. You wanted her in a safe place, didn't you?

9 A. I wanted her out of the area. She might get
10 hurt.

11 Q. You wanted Stacey, that's who you were after,
12 not Donna?

13 A. I did not. I wasn't thinking about Stacey at
14 all after I spoke his name. I was thinking about
15 getting Donna out and away from me so I can get out of
16 the door and hopefully be on my way and try to come up
17 with some explanation as to why I was there --

18 Q. You wanted --

19 A. And be thankful nobody was hurt.

20 Q. You wanted Donna in another area, you wanted
21 Donna away from you, Donna somewhere she wouldn't get
22 hurt and you asked her where Stacey was; do you agree
23 with all those things?

DAVID WASHINGTON
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A89

J. BENGE - CROSS

1 A. In the reverse order, yes. In the reverse
2 order you spoke them, the answer is: Yes.

3 Q. You then pulled her, as you say, ever so
4 gently away from the door as she attempts to run
5 outside and seat her ever so gently on the bench and
6 at that point Mr. Smith comes in, then charges at you
7 and attempts to tackle you; is that correct?

8 A. Let me go through that. That's a bunch of
9 questions, but I didn't use the words "ever so
10 gently". I grabbed Donna around her left arm to
11 try -- in the step area. I did it with enough force
12 to lead her back, not to pull her, not to grab her,
13 but to lead her back. She came back willingly. She
14 wasn't fighting me. She wasn't screaming. She wasn't
15 hollering. She didn't offer any resistance.
16 Willingly is not the right word. She didn't offer any
17 resistance. I was able to sit her down on the bench,
18 but, again, not ever so gently, but without harming
19 her in any way. As I took a step back, Mr. Smith
20 rounded the corner, halted just for an instant, looked
21 me in the face. I looked him in the face. We were
22 eye to eye looking at one another for just a blink of
23 an eye. I could see he recognized me and then he

DAVID WASHINGTON
Official Court Reporter

A90

J. BENGE - CROSS

1 charged at me two or three steps and lowered his head.
2 His arms were around me. She was probably three feet
3 from me when I got the pepper spray into his face
4 initially and within an instant, his arms were sort of
5 halfway around my waist after he had pulled the
6 sweatshirt up over my head so I couldn't see anything.

7 Q. In your version of what happened in the
8 living room, Mr. Smith, when he came barreling around
9 the corner, would have seen Donna sitting on the
10 bench, not crying, not screaming, not looking
11 particularly distraught, certainly not gagging from
12 the pepper spray because you hadn't sprayed her, you
13 were simply standing over her with no guns in your
14 hand and I am assuming no pepper spray in your hand at
15 that point, yet his reaction is to charge at you?

16 A. Ms. Withers, again, let me -- you asked a lot
17 there. Let me go back. I don't know what the look on
18 Donna's face was. I am sure it was distraught. She
19 was not screaming. She was not making any noise. In
20 fact, the only two noises she made was: What are you
21 doing here, she said, and then that strange sound of
22 fright that I tried to mimic. That's all the noises
23 she made with her vocal cords, that was it. Yes,

DAVID WASHINGTON
Official Court Reporter

A91

J. BENGE - CROSS

1 their attention, won't it?

2 A. Yes.

3 Q. You were going to kill Stacey and make Donna
4 watch, weren't you?

5 A. No, Ms. Withers, I was not. I had no
6 intention to harm Stacey Smith.

7 Q. Then you were probably going to kill
8 yourself, right?

9 A. As I've said, I had the idea, I had the
10 thought that this would end the nightmare I was
11 living. I didn't have the strength, if that's what it
12 takes, to end my own life.

13 Q. You told Donna Stacey's shadow shall never
14 darken the doorway of this home?

15 A. I said: Stacey Smith's shadow should never
16 darken the doorstep of Snuff Mill Road.

17 Q. And the only way to insure that before you
18 killed yourself was to kill him, right?

19 A. No, Ms. Withers, that was not my intention.
20 I was not thinking that to be what I wanted to have
21 happen. And, in fact, when the gun went off -- and
22 you haven't asked me about the rest of it. When the
23 initial shot went off, I was petrified. I didn't

DAVID WASHINGTON
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A92

1 believe it was real. I couldn't believe it was
2 happening. I didn't know he was shot. I couldn't
3 see. I hoped he wasn't. My only thought was to get
4 those guns out of the way of doing harm.

5 Q. You are quite a humanitarian, aren't you?

6 MR. HURLEY: I ask that be stricken from the
7 record.

8 THE COURT: Ladies and gentlemen of the jury,
9 disregard the prosecutor's last comment.

10 Mr. Hurley.

11 MR. HURLEY: Yes.

12 REDIRECT EXAMINATION

13 BY MR. HURLEY:

14 Q. I will not make any snide remarks, just ask
15 you a question. The first question is: Would you
16 pick up at the point where you and Mr. Smith were next
17 to each other with your sweatshirt over your head and
18 you heard the sound of a gun discharge, tell us step
19 by step what happened thereafter?

20 A. You are talking about the gun that came out
21 from my left side?

22 Q. Yes.

23 A. When the gun went off, it happened so fast

DAVID WASHINGTON
Official Court Reporter

A 93

J. BENGE - REDIRECT

1 that I had no thought -- no time to think about what
2 was happening. I had no time to even consider
3 anything other than the fact that there is a gun, it's
4 out, it's gone off, I don't know what happened, I got
5 to make sure that does not happen again. I jammed my
6 right hand back where the other gun was, trying to
7 hold that into the holster because I thought the first
8 gun was on the floor because I didn't feel any -- I
9 couldn't see it, of course, and I thought that that
10 was out of harm's way. I had another one that was --
11 my thought was to make sure that it doesn't come up
12 and go off and get in trouble. That gun was back
13 behind my hipbone. Somewhere half way in the scuffle,
14 my hand is back, I pushed it down. Mr. Smith's hands
15 were there. The next thing I knew, that gun was up,
16 it had fired, and it was quite a bit louder. A very,
17 very loud noise and we were then out the door. I was
18 on my back and I was being hit in the face with what I
19 thought was the underside of that gun. My nose was
20 broken. Very quickly I saw stars. The next thing I
21 knew, a police officer or someone was standing over me
22 asking me what happened.

23 Q. The gun that was on your left side, what

DAVID WASHINGTON
Official Court Reporter

A94

1 Supreme Court, I'm asking that you go back and make a
2 reference to the remark made by the prosecutor at the
3 end of her cross-examination that you ordered stricken
4 and go a little further and tell them just to make it
5 very clear that that's not to be given any
6 consideration whatsoever.

7 THE COURT: Ms. Withers, is there anything
8 you want to say?

9 MS. WITHERS: No, Your Honor.

10 THE COURT: All right. Like I said, it is an
11 area of heightened concern. The Supreme Court is
12 certainly frustrated about these things coming up over
13 and over and over, not only looking at the prosecutors
14 not to do these things, it is looking to the trial
15 court to take a more active role and to the extent
16 these things can be cleaned up, they be cleaned up. I
17 did want to mention those two things to you. I will
18 go back and say something more forceful.

19 We need to put something on the record with
20 the defendant regarding waiving his Fifth Amendment
21 protections. He testified he placed the tape recorder
22 under her bed in her home. Those charges are pending
23 in New Castle County. We had some brief discussions

DAVID WASHINGTON
Official Court Reporter

A95

1 gentlemen of the jury.

2 THE JURY: Good afternoon.

3 THE COURT: I just have one little comment
4 that I want to read to you regarding the closing
5 arguments by counsel. It is very brief.

6 At the conclusion of her remarks,
7 Mrs. Withers beseeched you to return a verdict of
8 guilt. It is improper for an attorney to make a plea
9 for a desired verdict. You are to base your verdict
10 only on the evidence and not on the request or plea by
11 an attorney. I instruct you, therefore, that you must
12 completely ignore and disregard that remark and not
13 allow that, in any way, to affect your verdict.

14 I am now going to read to you the
15 instructions on the law. This is going to take a
16 little while, but they have to be read in open court.
17 When I am done, I will excuse the four alternates and
18 the twelve jurors will get the case for consideration.

19 Each of you will get a copy of the
20 instructions so that you may refer to them, if you need
21 to. The last two pages of the instructions have some
22 of the definitions that are used throughout and the two
23 previous pages are a list of the possible verdicts in

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OFFICIAL COURT REPORTER

A96

1 this case.

2 Members of the jury, you have now heard all
3 the evidence that is going to be presented in this
4 case, and you have heard the arguments of the attorney
5 for the State and for the defendant. I shall not
6 review the evidence that has been presented to you
7 because you, as the jury, are the sole and exclusive
8 judges of the facts of the case, of the credibility of
9 the witnesses, and of the weight and value of their
10 testimony.

11 I shall now instruct you as to the applicable
12 principles of law governing this case. No single one
13 of these instructions states all of the law applicable
14 to this case. Therefore, you should listen to and
15 consider all of these instructions together in reaching
16 your verdict.

17 It is your duty as jurors to follow the law
18 as I shall state it to you. You are not to be
19 concerned with the wisdom of any rule or law stated by
20 me. You must apply the law, as instructed, even if you
21 do not agree with that law because it is the law of
22 this State as enacted by the Legislature.

23 It is your duty to determine the facts and to


EILEEN G. KIMMEL
OFFICIAL COURT REPORTER

A97

1 determine them only from the evidence presented to you.
2 You are to apply the law as I will instruct you to the
3 facts and, in this way, decide the case. If, in these
4 instructions, any rule, direction, or idea is stated in
5 a manner which appears to give it more significance
6 than the other instructions, no such emphasis is
7 intended by me and none should be inferred by you.

8 The defendant is charged by Indictment with
9 two counts of possession of a firearm during the
10 commission of a felony; attempted murder in the first
11 degree; assault in the second degree; and burglary in
12 the second degree. The defendant has pled not guilty
13 to these charges.

14 The Indictment is a mere accusation against
15 the defendant. It is the charging document. It is
16 not, in itself, any evidence of the guilt of the
17 defendant and you should not allow yourselves to be
18 influenced, in any way, however slightly, by the fact
19 that an Indictment has been filed against the
20 defendant.

21 In these instructions, I will explain the
22 elements of the offenses charged in the Indictment.
23 The elements of an offense are those physical acts,

EILEEN G. KIMMEL
OFFICIAL COURT REPORTER

A98

1 attendant circumstances, results and states of mind
2 which are specifically included within the definition
3 of the offense in the Criminal Code. If words are
4 defined in the Criminal Code, I will give you their
5 Code definitions. Otherwise, you should give words
6 their commonly-accepted meanings.

7 I will also explain the burdens of proof the
8 law imposes upon the State, as well as other aspects of
9 your function as jurors. And, finally, I will explain
10 the possible verdicts in this case.

11 Do you hear a lot of echo, Janice, through
12 the microphone?

13 All right, ladies and gentlemen. Count No. 1
14 is possession of a firearm during the commission of a
15 felony. The pertinent definition of the offense in the
16 Criminal Code is as follows:

17 "A person who is in possession of a
18 firearm during the commission of a felony
19 is guilty of possession of a firearm during
20 the commission of a felony.

21 In order to find the defendant guilty of
22 possession of a firearm during the commission of a
23 felony, you must find that all the following elements

EILEEN G. KIMMEL
OFFICIAL COURT REPORTER

A99

1 have been established beyond a reasonable doubt:

2 (1) There was a firearm. "Firearm" is
3 defined as follows: Any weapon from which a shot,
4 projectile, or other object may be discharged by force
5 of combustion, explosive gas, and/or mechanical means,
6 whether operable or inoperable, loaded or unloaded,
7 excluding a B-B gun; and,

8 (2) The defendant possessed the firearm.
9 "Possession" generally means dominion, control, and
10 authority. But a person is in possession of a firearm
11 within the meaning of this section only when it is
12 physically available and accessible to him during the
13 commission of a crime; and,

14 (3) The defendant acted knowingly. In other
15 words, he was aware that he possessed a firearm; and,

16 (4) The defendant possessed the firearm
17 during the commission of a felony. The felony is
18 alleged to be the commission of attempted murder in the
19 first degree, which is defined in Count No. 3.

20 If, after considering all the evidence, you
21 find that the State has established beyond a reasonable
22 doubt that the defendant acted in such a manner as to
23 satisfy all the elements which I have just stated, at

EILEEN G. KIMMEL
OFFICIAL COURT REPORTER

A100

1 or about the date and place in the Indictment, you
2 should find the defendant guilty of possession of a
3 firearm during the commission of a felony. If you do
4 not so find or if you have a reasonable doubt as to any
5 element of this offense, you must find the defendant
6 not guilty of possession of a firearm during the
7 commission of a felony.

8 Count No. 2 is possession of a firearm during
9 the commission of a felony. Again, the pertinent
10 definition of the offense in the Criminal Code is as
11 follows:

12 "A person who is in possession of a
13 firearm during the commission of a felony
14 is guilty of possession of a firearm during
15 the commission of a felony."

16 In order to find the defendant guilty of
17 possession of a firearm during the commission of a
18 felony in Count No. 2, you must find that all the
19 following elements have been established beyond a
20 reasonable doubt:

21 (1) There was a firearm. I have previously
22 defined "firearm" for you in Count No. 1; and,

23 (2) The defendant possessed the firearm.

EILEEN G. KIMMEL
OFFICIAL COURT REPORTER

A 101

1 Again, I have previously defined "possession" for you
2 in Count No. 1; and,

3 (3) The defendant acted knowingly. In other
4 words, he was aware that he possessed a firearm; and,

5 (4) The defendant possessed the firearm
6 during the commission of a felony. That felony is
7 alleged to be the commission of burglary in the second
8 degree, which is defined in Count No. 5.

9 If, after considering all the evidence, you
10 find that the State has established beyond a reasonable
11 doubt that the defendant acted in such a manner so as
12 to satisfy all the elements which I have just stated,
13 at or about the date and place in the Indictment, you
14 should find the defendant guilty of possession of a
15 firearm during the commission of a felony. If you do
16 not find or if you have a reasonable doubt as to any
17 element of this offense, you must find the defendant
18 not guilty of possession of a firearm during the
19 commission of a felony.

20 Count No. 3 is attempted murder in the first
21 degree. In order to find the defendant guilty of
22 attempted murder in the first degree, you have to find
23 that the following elements have been established

EILEEN G. KIMMEL
OFFICIAL COURT REPORTER

A102

1 beyond a reasonable doubt:

2 (1) The defendant attempted to cause the
3 death of Edward S. Smith. That is, the defendant
4 engaged in conduct which, under the circumstances as he
5 believed them to be, was a substantial step in a course
6 of conduct planned to culminate in commission of the
7 crime of murder in the first degree, as I shall define
8 it for you. A "substantial step" is an act or omission
9 which leaves no reasonable doubt in your mind as to the
10 defendant's intention to commit the crime of murder in
11 the first degree.

12 The pertinent definition of murder in the
13 first degree in the Criminal Code is as follows:

14 "A person is guilty of murder in the
15 first degree when he intentionally causes
16 the death of another person;"

17 (2) The defendant acted intentionally. That
18 is, it was his conscious object or purpose to cause the
19 death of Edward S. Smith.

20 If, after considering all the evidence, you
21 find that the State has established beyond a reasonable
22 doubt that the defendant acted in such a manner as to
23 satisfy all the elements which I have just stated, at

EILEEN G. KIMMEL
OFFICIAL COURT REPORTER

A 103

1 or about the date and place stated in the Indictment,
2 you should find the defendant guilty of attempted
3 murder in the first degree. If you do not so find or
4 if you have a reasonable doubt as to any element of
5 this offense, you must find the defendant not guilty of
6 attempted murder in the first degree and you may
7 consider the lesser-included offense of assault in the
8 first degree.

9 I have for your consideration two separate
10 counts of assault in the first degree. One is Section
11 613(a)(1) and the other is Section 613(a)(3). They are
12 two separate sections.

13 In order to find the defendant guilty of
14 assault in the first degree, Section 613(a)(1), you
15 must find that the following elements have been
16 established beyond a reasonable doubt:

17 (1) That the defendant acted intentionally.
18 I previously defined the term "intentionally" for you;
19 and,

20 (2) The intentional conduct caused serious
21 physical injury to Edward S. Smith by means of a deadly
22 weapon or a dangerous instrument. "Deadly weapon"
23 includes a firearm; a bomb; a knife of any sort, other

EILEEN G. KIMMEL
OFFICIAL COURT REPORTER

A 104

1 than an ordinary pocket knife carried in a closed
2 position; a switchblade knife; billy; blackjack;
3 bludgeon; metal knuckles; slingshot; razor; bicycle
4 chains; or ice pick; or any dangerous instrument which
5 is used or attempted to be used to cause death or
6 serious physical injury.

7 A "dangerous instrument" means any
8 instrument, article, or substance which, under the
9 circumstances in which it is used, or attempted to be
10 used, or threatened to be used, is readily capable of
11 causing death or serious physical injury. "Serious
12 physical injury" means physical injury which creates a
13 substantial risk of death or which causes serious and
14 prolonged disfigurement, prolonged impairment of
15 health, or prolonged loss or impairment of any bodily
16 organ.

17 If, after considering all the evidence, you
18 find that the State has established beyond a reasonable
19 doubt that the defendant acted in such a manner as to
20 satisfy all the elements which I have just stated, at
21 or about the date and place stated in the Indictment,
22 you should find the defendant guilty of assault in the
23 first degree, Section 613(a)(1). If you do not so find

EILEEN G. KIMMEL
OFFICIAL COURT REPORTER

A105

1 or you have a reasonable doubt as to any element of
2 this offense, you must find the defendant not guilty of
3 assault in the first degree, Section 613(a)(1) and you
4 may consider the offense of assault in the first
5 degree, Section 613(a)(3).

6 In order to find the defendant guilty of
7 assault in the first degree, Section 613(a)(3), you
8 have to find that the following elements have been
9 established beyond a reasonable doubt:

10 (1) That the defendant acted recklessly. A
11 person acts recklessly with respect to an element of an
12 offense when the person is aware of and consciously
13 disregards a substantial and unjustifiable risk that
14 the element exists or will result from the conduct.

15 The risk must be of such a nature and degree
16 that disregard thereof constitutes a gross deviation
17 from the standard of conduct that a reasonable person
18 would observe in the situation. A person who creates
19 such a risk but is unaware thereof solely by reason of
20 voluntary intoxication also acts recklessly with
21 respect thereto; and,

22 (2) The reckless conduct created a
23 substantial risk of death to Edward S. Smith and

EILEEN G. KIMMEL
OFFICIAL COURT REPORTER

A106

1 thereby caused serious physical injury to him. I have
2 previously defined the term "serious physical injury"
3 for you.

4 If, after considering all the evidence, you
5 find that the State has established beyond a reasonable
6 doubt that the defendant acted in such a manner as to
7 satisfy all the elements which I have just stated, at
8 or about the date and place stated in the Indictment,
9 you should find the defendant guilty of assault in the
10 first degree, Section 613(a)(3). If you do not so find
11 or if you have a reasonable doubt as to any elements of
12 this offense, you must find the defendant not guilty of
13 assault in the first degree, Section 613(a)(3) and you
14 may consider the lesser-included offense of assault in
15 the second degree.

16 In order to find the defendant guilty of
17 assault in the second degree, you have to find that the
18 following elements have been established beyond a
19 reasonable doubt:

20 (1) The defendant acted recklessly or
21 intentionally. I previously defined these terms for
22 you; and,

23 (2) The defendant caused physical injury to

EILEEN G. KIMMEL
OFFICIAL COURT REPORTER

A 107

1 Edward S. Smith by means of a deadly weapon or a
2 dangerous instrument. "Physical injury" means the
3 impairment of physical condition or substantial pain.
4 I previously defined the terms "deadly weapon" and
5 "dangerous instrument" for you.

6 If, after considering all the evidence, you
7 find that the State has established beyond a reasonable
8 doubt that the defendant acted in such a manner as to
9 satisfy all the elements which I have just stated, at
10 or about the date and place stated in the Indictment,
11 you should find the defendant guilty of assault in the
12 second degree. If you do not so find or if you have a
13 reasonable doubt as to any element of this offense, you
14 must find the defendant not guilty of assault in the
15 second degree and you may consider the lesser-included
16 offense of assault in the third degree.

17 In order to find the defendant guilty of
18 assault in the third degree, you have to find that all
19 the following elements have been established beyond a
20 reasonable doubt:

21 (1) The defendant acted with criminal
22 negligence. A person acts with criminal negligence
23 with respect to an element of an offense when the

EILEEN G. KIMMEL
OFFICIAL COURT REPORTER

A108

1 person fails to perceive a risk that the element exists
2 or will result from the conduct. The risk must be of
3 such a nature and degree that failure to perceive it
4 constitutes a gross deviation from the standard of
5 conduct that a reasonable person would observe in the
6 situation; and,

7 (2) The defendant's criminal negligence
8 caused physical injury to Edward S. Smith. Again, I
9 have previously defined "physical injury" for you; and,
10 lastly,

11 (3) The defendant used a deadly weapon or a
12 dangerous instrument to cause the physical injury.
13 And, again, I have previously defined those terms
14 "deadly weapon" and "dangerous instrument" for you.

15 If, after considering all the evidence, you
16 find that the State has established beyond a reasonable
17 doubt that the defendant acted in such a manner as to
18 satisfy all the elements which I have just stated, at
19 or about the date and place stated in the Indictment,
20 you should find the defendant guilty of assault in the
21 third degree. If you do not so find or if you have a
22 reasonable doubt as to any element of this offense, you
23 should find the defendant not guilty of assault in the

EILEEN G. KIMMEL
OFFICIAL COURT REPORTER

A109

1 third degree.

2 Count No. 4 of the Indictment is assault in
3 the second degree. In order to find the defendant
4 guilty of assault in the second degree in Count No. 4,
5 you have to find that the following elements have been
6 established beyond a reasonable doubt:

7 (1) The defendant acted intentionally. That
8 is, it was the defendant's conscious object or purpose
9 to incapacitate Donna Benge; and,

10 (2) The incapacitation was caused by means
11 of a disabling chemical spray or with any aerosol or
12 hand-sprayed liquid or gas; and,

13 (3) The assault took place while the
14 defendant was engaged in the commission of the crime of
15 burglary in the second degree, which is defined in
16 Count No. 5.

17 If, after considering all the evidence, you
18 find that the State has established beyond a reasonable
19 doubt that the defendant acted in such a manner as to
20 satisfy all the elements which I have just stated, at
21 or about the date and place stated in the Indictment,
22 you should find the defendant guilty of assault in the
23 second degree in Count No. 4. If you do not so find or

EILEEN G. KIMMEL
OFFICIAL COURT REPORTER

A110

1 if you have a reasonable doubt as to any element of
2 this offense, you must find the defendant not guilty of
3 assault in the second degree and you may consider the
4 lesser-included offense of offensive touching.

5 In order to find the defendant guilty of
6 offensive touching, you have to find that all of the
7 following elements have been established beyond a
8 reasonable doubt:

9 (1) The defendant intentionally touched
10 another person, Donna Benge, with a member of his body;
11 and,

12 (2) The defendant knew or was aware that he
13 was thereby likely to cause offense or alarm to the
14 other person, Donna Benge. A person acts "knowingly"
15 with respect to an element of an offense when (1) the
16 element involves the nature of the person's conduct or
17 the attendant circumstances, the person is aware that
18 the conduct is of that nature or that such circum-
19 stances exist; and, (2), if the element involves a
20 result of the person's conduct, the person is aware
21 that it is practically certain the conduct will cause
22 that result.

23 If, after considering all the evidence, you

EILEEN G. KIMMEL
OFFICIAL COURT REPORTER

A 111

1 find that the State has established beyond a reasonable
2 doubt that the defendant acted in such a manner as to
3 satisfy all the elements which I have just stated, at
4 or about the date and place stated in the Indictment,
5 you should find the defendant guilty of offensive
6 touching. If you do not so find or if you have a
7 reasonable doubt as to any element of this offense, you
8 must find the defendant not guilty of offensive
9 touching.

10 Count No. 5 is burglary in the second degree.
11 In order to find the defendant guilty of burglary in
12 the second degree, you have to find that the following
13 elements have been established beyond a reasonable
14 doubt:

15 (1) The defendant knowingly entered or
16 remained unlawfully in a dwelling located at the Oak
17 Grove Motel Court, Rehoboth Beach, Delaware. A person
18 enters unlawfully in a place when he has no license or
19 privilege to be there. That is, he does not have the
20 permission or consent of the owner of the place to be
21 there. You must, in order to find the defendant guilty
22 of burglary in the second degree, unanimously decide if
23 the defendant "knowingly entered" or "knowingly and

EILEEN G. KIMMEL
OFFICIAL COURT REPORTER

A112

1 unlawfully remained" in the dwelling; and,

2 (2) The place where the defendant entered or
3 remained unlawfully was a dwelling. The word
4 "dwelling" under our Criminal Code means a building
5 which is normally occupied by a person lodging therein
6 at night; and,

7 (3) The defendant acted knowingly. That is,
8 he knew or was aware that the property involved was a
9 dwelling and that he was entering or remaining
10 unlawfully; and,

11 (4) The defendant intended to commit a crime
12 in the dwelling. That is, it must have been the
13 defendant's object or purpose to commit some act which
14 is defined in our Criminal Code as a crime. In this
15 case, the State contends that the defendant intended to
16 commit the crime of attempted murder in the first
17 degree and you must find that the defendant intended to
18 commit that offense in order to convict him of burglary
19 in the second degree.

20 If, after considering all the evidence, you
21 find that the State has established beyond a reasonable
22 doubt that the defendant acted in such a manner as to
23 satisfy all the elements which I have just stated, at

EILEEN G. KIMMEL
OFFICIAL COURT REPORTER

A 113

1 or about the date and place stated in the Indictment,
2 you should find the defendant guilty of burglary in the
3 second degree. If you do not so find or if you have a
4 reasonable doubt as to any element of this offense, you
5 have to find the defendant not guilty of burglary in
6 the second degree and you may consider the lesser-
7 included offense of criminal trespass.

8 In order to find the defendant guilty of
9 criminal trespass in the first degree, you must find
10 that the following elements have been established
11 beyond a reasonable doubt:

12 (1) The defendant entered unlawfully into a
13 dwelling located at the Oak Grove Motor Court, Rehoboth
14 Beach, Delaware. I have previously defined the terms
15 "unlawfully" and "dwelling" for you; and,

16 (2) The defendant acted knowingly. Again, I
17 previously defined the term "knowingly" for you.

18 If, after considering all the evidence, you
19 find that the State has established beyond a reasonable
20 doubt that the defendant acted in such a manner as to
21 satisfy all the elements which I have just stated, at
22 or about the date and place stated in the Indictment,
23 you should find the defendant guilty of criminal

EILEEN G. KIMMEL
OFFICIAL COURT REPORTER

A114

1 trespass in the first degree. If you do not so find or
2 if you have a reasonable doubt as to any element of
3 this offense, you have to find the defendant not guilty
4 of criminal trespass in the first degree.

5 Those are all the specific instructions on
6 each of the counts. I will now go into some other
7 instructions in other areas of your function as jurors.

8 I have instructed you that an element of the
9 offense charged is that the defendant acted with a
10 required state of mind or with a particular belief. It
11 is, of course, difficult to know what is going on in
12 another person's mind. Therefore, our law permits you,
13 as the jury, to draw an inference or, in other words,
14 to reach a conclusion about the defendant's state of
15 mind from the facts and circumstances surrounding the
16 acts the defendant is alleged to have done.

17 In reaching this conclusion, you may consider
18 whether a reasonable man, in the defendant's circum-
19 stances, would have had or lacked the requisite state
20 of mind or belief. You should, however, keep in mind
21 at all times that it is this defendant's state of mind
22 or belief that is at issue here. And in order to
23 convict the defendant, you are required to find beyond

EILEEN G. KIMMEL
OFFICIAL COURT REPORTER

A115